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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

PERRY LEE OAKLEY,

Defendant and Appellant.

B297533

(Los Angeles County Super. Ct. No. YA080803)

APPEAL from a judgment of the Superior Court for Los Angeles County, Edmund Willcox Clarke, Jr., Judge. Affirmed.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Amanda V. Lopez and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent. Defendant Perry Lee Oakley appeals from the denial of his petition for resentencing under Penal Code¹ section 1170.95. Without appointing counsel for defendant and without defendant present, the trial court denied the petition on the ground that defendant's two second degree murder convictions did not come within the statute and therefore he did not qualify for resentencing. Defendant contends the trial court prejudicially erred and violated his federal constitutional rights by summarily denying his petition without appointing him counsel, and that he made a prima facie case showing his convictions came within the provisions of section 1170.95, subdivision (b). Finding no error, we affirm the judgment.

BACKGROUND

A portion of our background summary is based upon our prior decision affirming that conviction (*People v. Oakley* [nonpub. opn.], case No. B248796, filed Feb. 17, 2015 (*Oakley I*)), and other parts of the record in that appeal.²

A. Defendant's Murder Convictions

The facts underlying defendant's murder convictions were summarized in the opening statement of our prior decision affirming his

Further undesignated statutory references are to the Penal Code.

The Attorney General has asked us to take judicial notice of the record from defendant's prior appeal, and attached to that request our prior opinion affirming the judgment and the jury instructions given during defendant's trial. We grant that request.

convictions: "While intoxicated, defendant Perry Oakley drove an Acura sedan through a stop sign and collided with a Toyota Camry, killing two of the Camry's passengers." (Oakley I, supra, p. 2.) He was charged with two counts of second degree murder (§ 187, subd. (a)), along with several other counts. (Oakley I, supra, p. 2.) At trial, the jury was instructed with CALCRIM No. 520. (Oakley I, supra, p. 17.) That instruction informed the jury that to prove that defendant was guilty of murder, "the People must prove that: [¶] 1. The defendant committed an act that caused the death of another person; [¶] AND [¶] 2. When the defendant acted, he had a state of mind called malice aforethought." The instruction also informed the jury that malice aforethought could be express malice or implied malice, and instructed that "[t]he defendant acted with implied malice if: [¶] 1. He intentionally committed an act; $[\P]$ 2. The natural and probable consequences of the act were dangerous to human life; $[\P]$ 3. At the time he acted, he knew his act was dangerous to human life; [¶] AND [¶] 4. He deliberately acted with conscious disregard for human life."

The jury convicted defendant of both murder counts, as well as several other counts, and the trial court sentenced him to 82 years to life in state prison. (*Oakley I, supra*, at p. 2.) Defendant appealed from the judgment and we affirmed, finding, among other things, there was sufficient evidence to support the jury's conclusion that defendant acted with implied malice. (*Id.* at pp. 6-8.)

B. Defendant's Petition for Resentencing

Four years after we affirmed the judgment against defendant, defendant filed a form petition for resentencing under section 1170.95. The form petition has several boxes the petitioner may (or must) check. Among the boxes defendant checked were boxes indicating that his murder convictions were based upon the felony murder rule or the natural and probable consequences doctrine, that he could not now be convicted of those counts due to changes made to sections 188 and 189, and that he requested that counsel be appointed for him "during this resentencing process."

The trial court reviewed the petition without defendant (or the prosecutor) present; the court noted in its minute order that defendant was not represented by counsel. The court denied the petition, stating: "Defendant is the actual killer, not someone convicted only as an accomplice. His conviction was affirmed on appeal." The court then quoted the opening line of our opinion in *Oakley I* describing defendant's conduct that resulted in his murder convictions.

Defendant timely filed a notice of appeal from the trial court's order denying his petition.

DISCUSSION

A. Amendment of the Natural and Probable Consequences Doctrine
On January 1, 2019, California's felony murder rule and the
natural and probable consequences doctrine were altered by Senate Bill
No. 1437 (S.B. 1437). S.B. 1437 was enacted to "amend the felony
murder rule and the natural and probable consequences doctrine, as it

relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) It accomplished this purpose by amending section 188, defining malice, and section 189, defining the degrees of murder.

In amending section 188, S.B. 1437 added the following provision: "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3); Stats. 2018, ch. 1015, § 2.) S.B. 1437 also added the following provision to section 189: "A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: $[\P]$ (1) The person was the actual killer. $[\P]$ (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. $[\P]$ (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (§ 189, subd. (e); Stats. 2018, ch. 1015, § 3.)

B. Petitions Under Section 1170.95

In addition to amending the felony murder rule and the natural and probable consequences doctrine, S.B. 1437 also added section

1170.95. (Stats. 2018, ch. 1015, § 4.) That statute allows a person convicted of felony murder, or murder under the natural and probable consequences doctrine to "file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial. . . . [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189." (§ 1170.95, subd. (a).)

Subdivision (b)(1) of section 1170.95 requires that the petition be filed with the court that sentenced the petitioner, and must include (a) a declaration by the petitioner that he or she is eligible for relief under the section; (b) the superior court case number and year of conviction; and (c) whether the petitioner requests appointment of counsel. Subdivision (b)(2) provides that the trial court may deny the petition without prejudice if any of the information required by subdivision (b)(1) is missing and cannot be readily ascertained by the court. (§ 1170.95, subd. (b)(2).)

Subdivision (c)—the provision at issue in this appeal—provides: "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor

shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." (§ 1170.95, subd. (c).)

The remainder of the statute sets forth the procedure for responding to, and the hearing on, the order to show cause, as well as post-hearing matters.

C. Defendant's Contentions

Defendant contends (1) the trial court erred and violated his federal constitutional rights by denying his petition without appointing counsel for him and without allowing the parties an opportunity to submit briefing; and (2) the trial court erred in denying his petition because he alleged facts that, if true, would entitle him to relief. Neither contention has merit.

1. Summary Denial Before Appointment of Counsel and Briefing

The issue whether the summary denial by a trial court of a section 1170.95 petition before the appointment of counsel is permitted under the statute has been addressed by several courts and is currently before our Supreme Court. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1137-1140 (*Lewis*), rev. granted, S260598, March 18, 2020; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58 (*Cornelius*), rev. granted,

S260410, March 18, 2020; People v. Verdugo (2020) 44 Cal.App.5th 320 (Verdugo), rev. granted, S260493, March 18, 2020.) We find the analysis in Verdugo particularly persuasive. As that court explained, "the relevant statutory language, viewed in context, makes plain the Legislature's intent to permit the sentencing court, before counsel must be appointed, to examine readily available portions of the record of conviction to determine whether a prima facie showing has been made that the petitioner falls within the provisions of section 1170.95—that is, a prima facie showing the petitioner may be eligible for relief because he or she could not be convicted of first or second degree murder following the changes made by [S.B.] 1437 to the definition of murder in sections 188 and 189." (Verdugo, supra, 44 Cal.App.5th at p. 323; see also Lewis, supra, 43 Cal.App.5th at pp. 1137-1140; Cornelius, supra, 44 Cal.App.5th at p. 58.)

In reaching this conclusion, the *Verdugo* court noted that subdivision (b)(2) of section 1170.95 provides for an initial review to determine the facial sufficiency of the petition, while subdivision (c) "then prescribes two additional court reviews before an order to show cause may issue." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 328.) The first of those is "made before any briefing to determine whether the petitioner has made a prima facie showing he or she falls within section 1170.95—that is, that the petitioner may be eligible for relief—and a second after briefing by both sides to determine whether the petitioner has made a prima facie showing he or she is entitled to relief." (*Ibid.*)

The court observed that the first prima facie review of the petition under subdivision (c) of section 1170.95 "must be something more than simply determining whether the petition is facially sufficient; otherwise given subdivision (b)(2), this portion of subdivision (c) would be surplusage." (Verdugo, supra, 44 Cal.App.5th at pp. 328-329.) But the court noted that "the prebriefing determination whether the petitioner has made a prima facie showing he or she 'falls within the provisions of this section' must also be different from the postbriefing prima facie showing the petitioner 'is entitled to relief,' required for issuance of an order to show cause, if only in the nature and extent of materials properly presented to the court in connection with the second prima facie step, or else the two prima facie showings specified in subdivision (c) would be redundant." (Id. at p. 329.) The court concluded that "[t]he midpoint between section 1170.95, subdivision (b)(2)'s initial finding the petition is facially sufficient and subdivision (c)'s second prima facie showing the petitioner is entitled to relief is a preliminary review of statutory eligibility for resentencing, a concept that is a wellestablished part of the resentencing process under Propositions 36 and 47. [Citations.] The court's role at this stage is simply to decide whether the petitioner is ineligible for relief as a matter of law, making all factual inferences in favor of the petitioner." (*Ibid.*)

Addressing the process by which the court is to conduct the first review under section 1170.95, subdivision (c), the *Verdugo* court found that "subdivisions (a) and (b) of section 1170.95 provide a clear indication of the Legislature's intent. As discussed, subdivision (b)(2) directs the court in considering the facial sufficiency of the petition to

access readily ascertainable information. The same material that may be evaluated under subdivision (b)(2)—that is, documents in the court file or otherwise part of the record of conviction that are readily ascertainable—should similarly be available to the court in connection with the first prima facie determination required by subdivision (c). . . . Based on a threshold review of these documents, the court can dismiss any petition filed by an individual who was not actually convicted of first or second degree murder. The record of conviction might also include other information that establishes the petitioner is ineligible for relief as a matter of law because he or she was convicted on a ground that remains valid notwithstanding [S.B.] 1437's amendments to sections 188 and 189. . . . $[\P]$ Because the court is only evaluating whether there is a prima facie showing the petitioner falls within the provisions of the statute, however, if the petitioner's ineligibility for resentencing under section 1170.95 is not established as a matter of law by the record of conviction, the court must direct the prosecutor to file a response to the petition, permit the petitioner (through appointed counsel if requested) to file a reply and then determine, with the benefit of the parties' briefing and analysis, whether the petitioner has made a prima facie showing he or she is entitled to relief." (Verdugo, supra, 44 Cal.App.5th at pp. 329-330.)

With regard to the timing of the appointment of counsel for defendant, the *Verdugo* court found that "[t]he structure and grammar of [subdivision (c) of section 1170.95] indicate the Legislature intended to create a chronological sequence: first, a prima facie showing [the first sentence of the subdivision]; thereafter, appointment of counsel for

petitioner [the second sentence]; then, briefing by the parties [the third sentence]." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 332.) The court noted that it would not "make sense as a practical matter to appoint counsel earlier in the process since counsel's first task is to reply to the prosecutor's response to the petition. If, as here, the court concludes the petitioner has failed to make the initial prima facie showing required by subdivision (c), counsel need not be appointed. Of course, if the petitioner appeals the superior court's summary denial of a resentencing petition, appointed counsel on appeal can argue the court erred in concluding his or her client was ineligible for relief as a matter of law." (*Id.* at pp. 332-333.)

We agree with the *Verdugo* court's analysis. Thus, we find the trial court in this case did not violate section 1170.95 by conducting an initial prima facie review before appointing counsel for defendant and receiving briefing.

Nor did the trial court violate defendant's federal constitutional rights by conducting that review before appointing counsel. Defendant contends the determination whether his petition states a prima facie case for relief is a critical stage of the criminal proceeding, for which the Sixth Amendment provides defendant the right to counsel.³ But as our Supreme Court explained, proceedings under a statutory enactment

Defendant also contends the trial court's failure to appoint him counsel violated his federal due process rights because section 1170.95, subdivision (c) grants him the right to the appointment of counsel when requested. But as we discussed, the statute does not grant that right until after the trial court makes its initial prima facie determination under that subdivision.

that entitles an inmate to petition for resentencing to reduce, recall, or vacate a sentence do not implicate the Sixth Amendment, because a finding that the inmate is not eligible for resentencing "does not increase the petitioner's sentence; it simply leaves the original sentence intact." (*People v. Perez* (2018) 4 Cal.5th 1055, 1064; see also *Dillon v. United States* (2010) 560 U.S. 817, 828-829.)

2. The Trial Court Correctly Found Defendant Was Ineligible as a Matter of Law

Defendant argues that a prima facie case does not require proof of the ultimate issue; it just requires allegations of facts that, if true, would entitle him to relief. Therefore, he contends the trial court erred in denying his petition because he made all the allegations required for relief under section 1170.95. He is mistaken.

When making its initial prima facie determination under section 1170.95, subdivision (c), the trial court is not limited in its consideration to the allegations of the petition, nor must it necessarily accept those allegations as true. As the *Verdugo* court explained, section 1170.95 allows the trial court to consider readily available parts of the record of conviction—such as jury instructions, verdict forms, and the appellate court's opinion affirming the conviction—to determine whether that material "establishes the petitioner is ineligible for relief as a matter of law because he or she was convicted on a ground that remains valid notwithstanding [S.B.] 1437's amendments to sections 188 and 189." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 330.)

In this case, the record of conviction establishes as a matter of law that defendant is ineligible for relief. As the trial court noted, our opinion stated that defendant was the actual killer, not an accomplice: "While intoxicated, defendant Perry Oakley drove an Acura sedan through a stop sign and collided with a Toyota Camry, killing two of the Camry's passengers." (Oakley I, supra, p. 2.) Also as noted in our prior opinion, the jury found defendant guilty of second degree murder with malice aforethought under an implied malice theory. (Id. at pp. 2, 6-8.) The amendments S.B. 1437 made to sections 188 and 189 make clear that it was not intended to change the law of murder as it applied to the actual killer or to murder under an implied malice theory.⁴ Thus, resentencing under 1170.95 was not available to defendant.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J. COLLINS, J.

S.B. 1437 did not remove the provision of section 188 stating that the malice required for a finding of murder "may be express or implied" (§ 188, subd. (a)), nor did it alter the definition of implied malice.